Supreme Court, U.S.
FILED
JAN 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-876

In The
Supreme Court of the United States
October Term, 1985

JON A. VICARS,

Petitioner,

v.

THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

SAMUEL E. TROSOW
Counsel of Record
2161 Shattuck Avenue
Suite 303
Berkeley, California 94704
Telephone: (415) 841-5500

Attorney for Real Parties in Interest

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

TABLE OF CONTENTS

Pages

TABLE OF CASES iii

INTRODUCTION 1

REASONS FOR DENYING CERTIORARI:

I. THIS CASE PRESENTS NO CONSTITUTIONAL ISSUE INVOLVING THE RIGHT TO WITHDRAW FROM AN OCCUPATION. 3

II. THE REGULATIONS IMPOSED BY THE SUBJECT ORDINANCE DO NOT CONSTITUTE AN IMPERMISSIBLE TAKING OF PETITIONER'S PROPERTY. 4

A. The Regulations in Question do not Create such a Permanent Physical Invasion of Petitioner's Property to Constitute a Per Se Taking. 5

B. Even if the Ordinance Creates such a Permanent Physical Invasion of Petitioner's Property so as to Constitute a Per Se Taking, the Appropriate Remedy Would be a Determination of the Proper Level of Compensation which should be Paid. The Ordinance Provides a Mechanism for Guaranteeing such Just Compensation, but Petitioner has Failed to Avail Himself of such Remedies. 6

III. THE PETITIONER HAS FAILED TO EXHAUST ADMINISTRATIVE REMEDIES WHICH ARE AVAILABLE TO HIM UNDER THE ORDINANCE. 6

IV. THE LEGISLATIVE ENACTMENT OF CALIFORNIA GOVERNMENT CODE SECTIONS 7060, ET SEQ., RENDERS THIS PETITION MOOT. 8

TABLE OF CONTENTS—Continued

Pages

V. AN ACTION IN UNLAWFUL DETAINER IS NOT THE APPROPRIATE FORUM FOR CHALLENGING THE VALIDITY OF A MUNICIPAL REGULATORY SCHEME. 8

VI. ABSTENTION IS APPROPRIATE IN THIS CASE BECAUSE OF THE PENDENCY OF AN ACTION AGAINST THE CITY OF BERKELEY IN STATE COURT BY THE PETITIONER BASED UPON THE SAME ISSUE AS RAISED HEREIN. 9

CONCLUSION 11

TABLE OF CASES

	Pages
Fresh Pond Shopping Center, Inc. v. Callahan, — U.S. —, 104 S. Ct. 218 (1983)	2
Gonzales v. Gem Properties, 37 Cal. App. 3d 1029 (1974)	8
Huffman v. Pursue, Ltd., 420 U.S. 592 (1975)	11
Judice v. Vail, 430 U.S. 327 (1977)	11
Knowles v. Robinson, 60 Cal. 2d 620 (1963)	8
Lindsey v. Normet, 405 U.S. 56 (1972)	9
Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)	4, 5, 6
Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423 (1982)	11
Mobil Oil Corp. v. Handley, 76 Cal. App. 3d 956 (1978)	8
Nash v. City of Santa Monica, 37 Cal. 3d 97, appeal dis. No. 84-1168 (1984)	2, 3, 5
Samuels v. Mackell, 401 U.S. 66 (1971)	10
Trainor v. Hernandez, 431 U.S. 434 (1977)	11
Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, — U.S. —, 105 S. Ct. 3108 (1985)	7
Younger v. Harris, 401 U.S. 37 (1971)	10

INTRODUCTION

This case pits the policies of the City of Berkeley which regulate rents and rental practices against an individual's aversion to such regulation based upon his economic and political interests.

Petitioner seeks to test the validity of the "Good Cause for Eviction" procedures of the Berkeley Rent Stabilization and Eviction for Good Cause Ordinance, N.S.-5261 (hereafter referred to as the Ordinance) by means of a writ of certiorari for review of a dismissal of his state court unlawful detainer action.

Real Parties in Interest, the defendants in the underlying unlawful detainer action, herein advance a variety of reasons why the instant petition should be denied. At the outset, real parties note the sparse record which accompanies the petition.

The case comes before this Court on the pleadings because petitioner has chosen to present his claim through the vehicle of an unlawful detainer action rather than through his pending state court action against the City of Berkeley. Thus, there is nothing in the record which demonstrates that petitioner is unable to enjoy a fair rate of return on his investment. There is nothing in the record to show that the petitioner is unable to delegate to others those landlordly tasks which he finds so personally repugnant. There is nothing in the record to indicate how the ordinance operates against this petitioner in a particularly draconian manner. The record merely demonstrates that petitioner came to own a building inhabited by tenants who had the right to possession of their units pursuant to rental agreements with either the petitioner or his prede-

cessor. Eviction controls were in effect at the time of the petitioner's commencement of ownership, and the attached complaint indicates that after he acquired ownership, the petitioner continued to let units as they became vacant.

The petition presents more in the way of a polemic against rent control than a serious discussion of any federal constitutional issue. The petition fails to distinguish the case at bar from recent cases raising similar issues. In both *Nash v. City of Santa Monica*, 37 Cal. 3d 97 (1984) (appeal dis. 84-1168), and *Fresh Pond Shopping Center, Inc. v. Callahan*, 104 S. Ct. 218 (1983), this Court dismissed appeals for want of a substantial federal question.

Moreover, review in this case should be denied on grounds not reaching the merits of petitioner's constitutional contentions. First, petitioner fails to demonstrate exhaustion of his administrative remedies, rendering this controversy unjusticiable due to lack of ripeness. (Section III)

Second, petitioner's claims regarding his right to evict his tenants and go out of business are rendered wholly moot by the passage of recent California legislation which will give him this right before this case could reasonably be decided should review be granted. (Section IV)

Third, the procedural posture under which this petition arises provides ample grounds for denial. The underlying state court action was brought against the tenants of the property in unlawful detainer, a special summary statutory procedure. It is well established that such actions are strictly limited in nature. Adequate state grounds for

the decisions reached below exist on the simple procedural point that the litigation of the constitutional validity of the subject regulations is beyond the scope of the California unlawful detainer statute. (Section V)

Fourth, the pendency of a state court action against the City of Berkeley on the same claim provides grounds for federal court abstention based upon considerations of comity and the principle of exhaustion of adequate and available state court remedies at law. (Section VI)

REASONS FOR DENYING CERTIORARI

I. THIS CASE PRESENTS NO CONSTITUTIONAL ISSUE INVOLVING THE RIGHT TO WITHDRAW FROM AN OCCUPATION.

Petitioner Vicars has put forth the proposition that the Ordinance has abridged his constitutionally protected right to withdraw his personal time, abilities and energies from the occupation of providing rental housing.

The Ordinance, however, lacks any element of coercion which forces Vicars to personally remain in business against his will. He is free to delegate his responsibilities to a manager, withhold units as they become vacant, or sell the property and invest the proceeds elsewhere.

These are the reasonable alternatives available to the owner discussed by the California Supreme Court in *Nash v. City of Santa Monica*, 37 Cal. 3d 97 (1984), (appeal dis. No. 84-1168).

Vicars does not wish to utilize any of these alternatives. Instead, he wishes to withdraw his units immediately because he objects to the requirements of the Ordinance for economic and political reasons. (Pet. for Cert., p. 9) In order to accomplish this purpose, petitioner attempted to remove all of the tenants simultaneously. Consequently, he found the ensuing unlawful detainer actions to be unenforceable as they were in violation of the eviction protection provisions of the ordinance.

While petitioner may find the local regulations distasteful, his personal and economic reasons for disliking rent control do not give rise to any more of a federal constitutional claim than the similar contentions which were advanced and rejected in *Nash, supra.*

II. THE REGULATIONS IMPOSED BY THE SUBJECT ORDINANCE DO NOT CONSTITUTE AN IMPERMISSIBLE TAKING OF PETITIONER'S PROPERTY.

Petitioner contends that the Ordinance mandates such a permanent physical invasion of his property that a taking has occurred without regard to the public interests which the regulations serve. Such a per se taking was found in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Petitioner submits that *Loretto* is controlling here.

Real Parties, on the other hand, assert that any claim of a taking must be determined on its own merits based upon the societal importance of the interest being protected by the regulation and whether the ordinance bears a reasonable relationship to such a purpose. Such an ap-

proach was used in *Nash, supra,* and is the appropriate standard absent a clear indication on the record of a permanent physical invasion of the petitioner's property.

A. The Regulations in Question do not Create such a Permanent Physical Invasion of Petitioner's Property to Constitute a Per Se Taking.

The record in the present case does not demonstrate the requisite permanent physical invasion of the petitioner's property so as to trigger the *Loretto* standard for a taking per se. Each of the tenants contracted either with the petitioner or the petitioner's predecessor and thereupon entered into rental agreements for the use and occupancy of their respective units. This is not a "physical invasion" within the meaning of *Loretto*. Nor is the tenants' occupancy permanent. The good cause for eviction section of the ordinance specifies ten different causes for eviction. It should also be noted that petitioner was presumptively aware of the subject regulations at the time of his purchase of the building in 1982 as they had been in force for two years. As a result, petitioner cannot show, nor has he even alleged, any interference with the "investment-backed expectations" which was noted as particularly significant in *Loretto*. *Id.*, at 418.

In fact, petitioner obtained exactly what he bargained for when he purchased the building: a ten unit property filled with tenants who were protected by the provisions of the eviction for good cause ordinance. The right to possession of the individual units had been, in every case, volitionally alienated by the owner of the property. No damage or [illegible]unition of the reversionary interest has been

demonstrated on the record. As such, the per se taking rule is not appropriately invoked in this case.

B. Even if the Ordinance Creates such a Permanent Physical Invasion of Petitioner's Property so as to Constitute a Per Se Taking, the Appropriate Remedy would be a Determination of the Proper Level of Compensation which should be Paid. The Ordinance Provides a Mechanism for Guaranteeing such Just Compensation, but Petitioner has Failed to Avail Himself of such Remedies.

The result of the holding in *Loretto* was not the removal of the cable facilities, but a remand to the state court so the proper level of compensation could be determined. By analogy, even if petitioner is suffering a permanent physical invasion which constitutes a taking per se, this would not necessarily invalidate the regulation so long as just compensation was received. The ordinance in question guarantees the owner a fair return on his investment. If the owner feels that he is not being adequately compensated, administrative remedies are available to ensure an appropriate rent increase. But this petitioner does not demonstrate that such recourse was sought prior to seeking judicial relief.

III. THE PETITIONER HAS FAILED TO EXHAUST ADMINISTRATIVE REMEDIES WHICH ARE AVAILABLE TO HIM UNDER THE ORDINANCE.

Petitioner submits that Section 13 of the Ordinance constitutes a taking of his property in violation of the Fifth and Fourteenth Amendments. (Pet. for Cert., pp.

13-16) He also urges the court to find that his right to withdraw from the "occupation" of providing rental housing has been violated because the court below precluded him from showing that "the meager income allowed by the regulated rentals did not provide for hiring others in order to minimize his personal involvement." (Pet. for Cert., p. 12)

However, the same ordinance which petitioner seeks to challenge through this action provides a speedy administrative remedy to insure that the owner receives a fair return on investment.

The record in this case fails to disclose whether Vicars attempted to obtain a rent increase from the Rent Stabilization Board to compensate for any permanent physical invasion he was forced to suffer as a result of the ordinance. Nor does Vicars assert that he attempted to seek an adjustment for any other increase in maintenance or operating expenses necessary to maintain a fair rate of return.

As a result, this claim is not ripe under the authority of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, — U.S. —, 105 S. Ct. 3108 (1985). In that case, this Court held a taking claim premature because the respondent failed to seek relief through available administrative remedies. Vicars' failure to petition the Rent Stabilization Board for appropriate relief in the form of a petition for a rent increase is analogous to Hamilton Bank's failure to seek a variance before claiming that its property was taken without just compensation.

IV. THE LEGISLATIVE ENACTMENT OF CALIFORNIA GOVERNMENT CODE SECTIONS 7060, ET SEQ. RENDERS THIS PETITION MOOT.

The California Legislature has recently enacted a bill which gives landlords the right to withdraw their property from the rental housing market. (Stats. 1985, c. 1509, SB 505) This law is effective on July 1, 1986 and permits landlords to evict their tenants if they wish to go out of business notwithstanding local regulation.

In light of the foregoing, there is clearly no substantial federal question as the claim of petitioner is moot. Accordingly, review should be denied.

V. AN ACTION IN UNLAWFUL DETAINER IS NOT THE APPROPRIATE FORUM FOR CHALLENGING THE VALIDITY OF A MUNICIPAL REGULATORY SCHEME.

Petitioner has chosen an action in unlawful detainer as one of his procedural vehicles for challenging the Berkeley Ordinance. Unlawful detainer is a special statutory procedure, (California Code of Civil Procedure, Sections 1159, *et seq.*), within which the litigable issues are strictly limited. *Knowles v. Robinson* (1963) 60 Cal. 2d 620; *Gonzales v. Gem Properties, Inc.* (1974) 37 Cal. App. 3d 1029; *Mobil Oil Corp. v. Handley* (1978) 76 Cal. App. 3d 956. The procedural rights of an unlawful detainer defendant are extremely limited. The time to respond to service of process is five days instead of thirty, the action is entitled to preference in trial setting, and stay of execution pending appeal is not granted as a matter of right. This court has held that neither the limitation on litigable issues nor early trial provisions are violative of due proc-

ess or equal protection. *Lindsey v. Normet*, 405 U.S. 56 (1972).

Real Parties submit that the validity of an important municipal regulatory scheme cannot be properly litigated in such a summary procedure in a Municipal Court. Petitioner should properly bring an action in the nature of declaratory relief in Superior Court.

Nevertheless, petitioner asserts that review is appropriate because he "... was denied the opportunity to amend his pleading to plead the economic hardship imposed on him. (Pet. for Cert., p. 8) In his Application for Certification to the Court of Appeal (Pet. for Cert., Appendix F), petitioner argues that the subject ruling acted to deny him the right to trial on issues such as the saleability of the property, sufficiency of income to hire a management company and the rational relationship standard. (Appendix F-2) These issues are clearly beyond the scope of the summary unlawful detainer proceeding.

In accordance with the statutory scheme enacted in the State of California concerning unlawful detainer proceedings, further review should be denied.

VI. ABSTENTION IS APPROPRIATE IN THIS CASE BECAUSE OF THE PENDENCY OF AN ACTION AGAINST THE CITY OF BERKELEY IN STATE COURT BY THE PETITIONER BASED UPON THE SAME ISSUE AS RAISED HEREIN.

Currently pending in California state court is the action *Vicars v. City of Berkeley* (Alameda County Superior Court No. 582948-6), wherein the instant petitioner is seeking damages, injunctive and declaratory relief against the

City. The action is based on the grounds that the City is preventing him from exercising his constitutional right to go out of business.

This action raises the very issues which petitioner claims were improperly excluded from consideration in the underlying unlawful detainer action. (A copy of the complaint in that action is attached to the brief of Amicus City of Berkeley as Appendix A.) Real Parties concur with the City's contention that any ruling by this Court in the case at bar will have a substantial impact on the result of that state court action.

The pendency of the state court action provides further reason why the instant petition should be denied. Petitioner has an adequate remedy at law directly against the City of Berkeley for any damages he might suffer as a result of his inability to evict the tenants.

Moreover, abstention is proper in this case based upon developing standards of justiciability. In *Younger v. Harris,* 401 U.S. 37 (1971), this Court enumerated the principle that federal courts should abstain when a state criminal prosecution is pending. Several reasons were stated for such abstention including the notion of comity, and the existence of adequate remedies at law in the state proceeding. This Court also considered that a request for an injunction against the enforcement of a challenged statute is likely to require the court to engage in a "speculative and amorphous" line by line analysis of the statute, rather than deciding a concrete controversy.

This concept was applied to an action in declaratory relief challenging the constitutionality of a state criminal statute in *Samuels v. Mackell,* 401 U.S. 66 (1971), and to

state civil proceedings where a public entity is a party and important state interests are involved. *Huffman v. Pursue Ltd.*, 420 U.S. 592 (1975); *Judice v. Vail*, 430 U.S. 327 (1977); *Trainor v. Hernandez*, 431 U.S. 434 (1977); *Middlesex County Ethics Comm. v. Garden State Bar Assn.*, 457 U.S. 423 (1982).

While petitioner is not technically seeking injunctive or declaratory relief, the effect of granting review herein will nave, as a practical matter, the same effect.

Particularly in light of the sparse record accompanying this petition, review should be denied based upon the foregoing principles.

CONCLUSION

For any and each of the above reasons, the Real Parties in Interest submit that Certiorari should be denied.

DATED: January 17, 1986

Respectfully submitted,

By /s/ SAMUEL E. TROSOW
Attorney for Real Parties in Interest